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CHARLES ELMORE

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

## No. 175

MARCUS HAUGE,

*Appellant,*

*vs.*

CITY OF CHICAGO, a municipal corporation,

*Appellee.*

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

HONORABLE FRANK M. PADDEN, TRIAL JUDGE.

## APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

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MAY IT PLEASE THE COURT:

### *Opinions Below.*

The majority and minority opinions in this case in the Court below are reported, *City of Chicago* v. *Waters*, 363 Ill. 125, 1 N. E. (2d) 396.

*Jurisdictional Grounds.*

A jurisdictional statement has been filed by appellant. The grounds on which the jurisdiction of this Court are invoked will not be repeated here.

*Scope of this Brief.*

This brief in opposition to the appellee's alternative motions to dismiss or affirm filed with the appellee's statement opposing jurisdiction is a supplement to the appellant's jurisdictional statement and will so far as possible avoid a repetition of matters contained in such jurisdictional statement. In the present brief we shall follow the order of the contentions made by appellee in its statement opposing jurisdiction.

*The case of City of Chicago* v. *Wisconsin Lime and Cement Co. distinguished.*

The appellee states that the Chicago ordinance involved here was sustained in *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520, 144 N. E. 3, and that a writ of error to review that judgment was dismissed for want of jurisdiction. The defendant in that case (270 U. S. 626) did not in the Supreme Court of Illinois challenge the ordinance as being invalid under the 14th Amendment and accordingly the Supreme Court of Illinois did not pass upon such a contention. Therefore, the action of this Court in dismissing that case was based upon the fact that the Federal question was not raised below, and was not based upon the appellee's present contention that the Federal question concededly raised below in the present case is not substantial.

The Supreme Court of Illinois in the instant case held that *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520, is not controlling in any respect in the decision of the questions raised here. Both the majority and the dissenting judges agreed on that. The majority opinion, after setting forth the contentions of the appellant, among them that the ordinance violates the Federal constitution, states:

> "This issue is one of first impression in this court, and we are not referred by either side to any decision where the precise question presented has been decided. * * * The power of the city to adopt the particular ordinance before us, together with its reasonableness, and that it was not subject to attack as making a classification obnoxious to the constitutional provision, was definitely decided in the *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520. The attack here made on the validity and constitutionality of the ordinance is not the same, however, as was decided in that case."

The minority opinion states:

> "The argument that the case of *Wisconsin Lime and Cement Co.* v. *City of Chicago*, 312 Ill. 520, is controlling here, is not impressive. This ordinance was there held to be reasonable as applied to coal dealers operating within the city of Chicago, on the ground that it was, 'liberal in permitting the dealers themselves to be appointed deputies for their own convenience.' Here the record shows that the complaining mining companies cannot obtain weighmasters certificates, thus effectually shutting out of the markets of the city of Chicago a commodity that the people have a right to buy."

The holding by the Illinois Supreme Court in the *Wisconsin Lime and Cement Co.* case, that this ordinance was constitutional under the state constitution when applied to the business of operating a local coal yard, has no bearing upon its validity under the Federal constitution when applied to the totally different situation presented by the record in this case.

*Specification of Errors Relied On.*

1. The Supreme Court of Illinois erred in holding that Section 2947 of the Revised Chicago Code of 1931 is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois erred in holding that said Section does not deny to the appellant the equal protection of the laws guaranteed to the appellant by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Illinois erred in holding that said Section does not deprive the appellant of liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Illinois erred in affirming the judgment of The Municipal Court of Chicago.

## I.

**The constitutionality of the ordinance under the Federal Constitution was raised in and decided by the Supreme Court of Illinois.**

Appellee first contends that the Supreme Court of Illinois would have been justified in ignoring the appellant's contention that the ordinance involved here violates the 14th Amendment and that therefore the decision of that question was "unnecessary" to that court's decision. If that court had declined to pass upon the appellant's contention that the ordinance violates the Federal constitution, then it would be necessary for us in order to sustain the jurisdiction of this Court on this appeal to show that the question was seasonably presented to the Illinois Supreme Court. Such is the purport of the cases cited by the appellee under Point I of its opposing jurisdictional statement. The Illinois court did not decline to pass upon the appellant's contention that the ordinance violates the Federal constitution, but treated it as properly raised under the practice there prevailing (which, in fact, it was) and expressly decided the constitutional issue presented to it. What the court might have done is of no importance here. The question here is settled by what the court actually did.

In *Rogers* v. *County of Hennepin*, 240 U. S. 184, at pp. 188-189, this Court held, per Mr. Justice Hughes, that where the state court does not decide against the appellant on an independent state ground but, deeming the Federal question to be before it, actually decides it adversely to the Federal right asserted, this Court has jurisdiction.

In Appellant's Jurisdictional Statement we set forth "the errors relied on" by the appellant in the Supreme Court of Illinois. By rule 39 of that Court (361 Ill. xix), such errors take the place of assignments of error attached to the record, formerly required in that state but now abolished. The errors so quoted specifically challenged the constitutionality of the ordinance under the Federal, as distinguished from the state constitution and appellant argued throughout his briefs that the ordinance was unreasonable in that it imposed an unnecessary and arbitrary restriction upon a lawful and legitimate business, namely, the business of trucking coal direct from the mine to the consumer. Such an argument supported appellant's contention that the ordinance violated the Fourteenth Amendment.

That the appellant's contention was clear to the Supreme Court of Illinois and was decided by it is shown by the majority opinion which stated in part:

> "It is here urged that by reason of these requirements, as applied to the defendants, the ordinance is unreasonable, deprives the defendants of the equal protection of the law and deprives them of liberty and due process of law in violation of Section 1 of the Fourteenth Amendment to the Federal constitution and of section 2 of article 2 of the Illinois constitution."

After stating its reasons therefor, the court then said:

> "The ordinance is not unreasonable and is not susceptible to the charges lodged against it of being a violation of the State and Federal constitutions."

In the recent case of *International Steel & Iron Co.* v. *National Surety Co.*, 80 L. ed. (Adv. Ops.) 585, at p. 588, this Court said:

> "Counsel for the appellant requested at the bar a continuance of the cause to afford opportunity for

amplification of the record disclosing the basis of decision. The application was granted, a petition was filed in the court below, and, in response thereto, the court added to its opinion a recital that a reargument had been ordered upon 'the constitutionality, construction, and applicability' of Chapter 80 of the Acts of 1929, and, prior to reargument, counsel for the appellant had filed a brief raising the federal constitutional question under Article 1, § 10, and the Court intended to express the opinion that the Act, as construed by it, 'did not impair the obligation of contracts in violation of * * * the contract clause of * * * the Constitution of the United States.' These additional proceedings have been certified and added to the record. Upon the record as thus supplemented we have jurisdiction."

This decision we submit is conclusive of the question raised here because the statement of the Illinois Supreme Court in its opinion is fully as strong as the recital added to the opinion by the state court in the above case.

The appellee argues under Point I that the judgment rendered in this case "could have been given without deciding that the ordinance did not violate the Fourteenth Amendment." On the contrary, it is self evident that the court could not sustain a judgment based on the ordinance, as it did, without holding that the ordinance did not violate the 14th Amendment, because the validity of the ordinance had been expressly challenged on that ground. That two charges were lodged against this ordinance, one under the State constitution and the other under the Federal constitution, is unimportant because the charges were independent of each other. If either charge was sustained the ordinance was invalid. By holding the ordinance valid,

the court overruled both charges. The validity of the ordinance was thus "drawn in question" "on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity", so that under Sec. 237(a) of the Judicial Code as amended February 13, 1925 (Chap. 229, 43 Stat. 936) this Court has jurisdiction of this appeal.

The appellee's further contention that the errors assigned in this Court are too indefinite to raise the constitutional questions here asserted is best answered by reading the first three errors assigned.

## II.

### The decision of the Supreme Court of Illinois was not based upon local law.

In Point II of its opposing jurisdictional statement, the appellee admits that one of the points "necessary to a decision of the case" by the court below was "(2) The validity of the ordinance." As we have shown above, the decision of this question required a decision of the Federal question here discussed, because, as pointed out, the ordinance was attacked as unconstitutional under both the State and the Federal constitutions.

We have no quarrel with the decisions cited under Point II of appellee's jurisdictional statement. While the appellee states broadly that the question of the validity of a municipal ordinance is a question of local law and will not be reviewed by the Supreme Court of the United States, it should be pointed out that the cases cited by it hold this statement to be true only when the question is whether a State constitution, as distinguished from the Federal constitution, is violated by an ordinance.

We are not asking this Court to review the decision of the Supreme Court of Illinois in so far as it construes the meaning of the ordinance and in so far as it holds that the ordinance is valid under the Illinois constitution. But the question whether the ordinance violates the Federal constitution is one to be determined finally by the Supreme Court of the United States and is clearly not a question of local law: *John P. King Mfg. Co.* v. *City Council of Augusta*, 277 U. S. 100, 72 L. ed. 801; *Price* v. *Illinois*, 238 U. S. 446.

## III.

**A substantial Federal question is presented by this appeal.**

The record is clear and uncontradicted that the ordinance in question bars this appellant from engaging in a useful, necessary and legitimate business, namely, the trucking of coal direct from mine to consumer, which business results in large savings to the consuming public. Our complaint against this result is declared by appellee to raise an unsubstantial Federal question. This court has said that to sustain this contention, the appellee must show that the asserted invalidity of the ordinance here involved "is devoid of merit and unsubstantial, either because concluded by previous authority, or because of its absolutely frivolous nature." (*Deming* v. *Carlisle Packing Co.*, 226 U. S. 102.)

Following the sequence of appellee's argument, we shall show under Point IV, below, that the present question is not concluded by previous authority, and shall discuss here the point whether the Federal question asserted by appellant is "absolutely frivolous."

The question is whether in view of previous decisions the questions presented by the appellant "are so wanting

in substance as not to need further argument," (*City of Boston* v. *Jackson*, 260 U. S. 309). The fact that appellee devotes thirteen typewritten pages to an argument intended to prove that appellant's contention is not arguable is itself strong refutation of its contention.

The cases cited by appellee under its Point III, apart from their statements of the well-accepted general rules governing motions to dismiss or affirm, are not applicable to the record in the instant case. They are clearly distinguishable.

In *Zucht* v. *King*, 260 U. S. 174, every separate contention made by the plaintiff in error in support of his writ had been determined adversely by previous decisions of this Court. The one Federal question which this Court found to be substantial—the charge that there was unconstitutional discrimination by officials in the enforcement of a constitutional ordinance—was not ground for a writ of error under the Judicial Code, so the writ was dismissed.

In *Corrigan* v. *Buckley*, 271 U. S. 323, no statute or ordinance whatever was involved, the question at issue concerned private contracts which were not ground of any jurisdiction of this Court, and under those circumstances the Court dismissed the appeal as "plainly without merit and frivolous."

In *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, the state court construed a state statute as applying alike to citizens and non-citizens of the state and the plaintiff in error's complaint that the statute unconstitutionally discriminated between those two classes would have required this Court to overturn the state court's construction of the statute before there would have been the slightest semblance of a constitutional question to be

argued here by the plaintiff in error. This Court's acceptance of the interpretation placed on the state statute by the state court eliminated all constitutional ground of plaintiff in error's complaint and this Court dismissed the writ of error.

In *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, the Court held that a state court's refusal to permit the removal of a case to the Federal court which plainly was not removable did not raise a substantial Federal question, that the writ of error in that case was sued out for delay, and that it should be dismissed with damages for delay.

The City of Chicago seeks here to avoid a review on the merits of the judgment of the Supreme Court of Illinois by its assertion that the ordinance involved is within the police power of the State of Illinois and by ignoring the limitations on the exercise of that power. Appellant freely concedes that the prevention of short weights is a laudable purpose but asserts, with the authority of every decision of this Court that has ever dealt with the question, that the method used must be non-discriminatory and reasonable to constitute a constitutional exercise of such power.

Whether the ordinance involved here is *non-discriminatory and is reasonable* is, to say the least, highly arguable (as indicated by the fact, alone, that two of the seven judges below dissented) and, therefore, presents a question which can only be determined by reviewing the cause on the merits. Certainly appellant's contentions are neither "absolutely frivolous" nor so plainly without merit as "not to need further argument."

This Court said in *Atchison, T. & S. F. Ry. Co.* v. *Vosburg*, 238 U. S. 56, at page 59:

> "But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the 14th Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation."

The vice of the ordinance complained of is that the appellant and others engaged in the business of trucking coal from mine to consumer are required by it to dump the load en route in order to permit a public weighmaster to procure the tare weight of the vehicle *before delivery.* This burden is not imposed upon a person owning a Chicago coal yard because he may himself act as his own public weighmaster at the point of original loading. Recognizing the substantial character of appellant's complaint, the City of Chicago—after acting to the contrary in its administration of the ordinance for many years and after contending to the contrary in both courts below—now seeks to evade the issue of whether the unloading requirement as applied to persons in appellant's situation is unconstitutional by saying:

> "This [the ordinance] leaves the manner and time of ascertaining the tare weight to the public weighmaster and the provision is by no means so drastic as appellant's counsel or the dissenting justices state."

Significantly, appellee does not intimate any other method of complying with the ordinance than by unloading and reloading the truck before delivery; on the contrary it ridicules every other method which is advanced by the

dissenting judges or by the appellant as a reasonable method of getting honest weights.

As pointed out below, the Illinois Supreme Court has construed this ordinance as requiring the rehandling now recognized as "drastic" and has decided the case on a construction which directs the so-called public weighmaster to require this rehandling as a condition to issuing a weighmaster's certificate.

Since all weighmasters in Chicago are competitors of the appellant it is childish to assert that they would give any different construction to the ordinance than that impressed upon it by the Supreme Court of Illinois. Such construction is binding upon this Court in its determination of the constitutionality of the ordinance. (*Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445; *Morehead* v. *New York*, 80 L. ed. (Adv. Ops.) 921.)

Further appellee's counsel says:

> "Of course to give value to the weight certificate it must contain true net weight, and in order to be able to state the net weight it is incumbent upon the public weighmaster to ascertain the gross and tare weights."

Since the tare weight is the weight of the empty vehicle and the tare weight must be on the weight certificate *before the coal is delivered*, counsel, in fairness to the Court, should point out how this tare weight can be obtained without dumping the load.

Had the Supreme Court of Illinois construed the ordinance as not requiring appellant to unload and reload his coal en route to the consumer, the ordinance as thus construed would be reasonable, the complaint in the court below would have been obviated, and appellant would not now

be appealing to this Court. However, it determined that it is necessary to dump and reweigh the load in order to get a weighmaster's certificate. It said:

> "It is more convenient, and doubtless less expensive, for the particular dealer to weigh his truck, both empty and loaded, on the public weighmaster's scale at Morris. *This, however, is not a compliance with the ordinance.* The defendants claim it is unreasonable to require them to unload their trucks after entering Chicago, weigh the truck empty and then reload and make delivery, and that the coal is always damaged and that there is always a loss of coal occasioned by the unloading and reloading." (Italics ours.)

Further on in its opinion the Court said of appellants:

> "They have merely elected to do their business in a manner more convenient to them and different from the method prescribed by the ordinance."

Mr. Chief Justice Stone of the Illinois Supreme Court and Mr. Justice Shaw, dissenting, recognized the vice inherent in the ordinance and said:

> "It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal re-loaded and weighed again. This extra and useless handling charge can inure only to the benefit of local dealers and it can only result in penalizing the consumer and the outside producer."

It is, therefore, clear that in both the majority and minority opinions the Court construed the ordinance as requiring a reweighing involving a rehandling of the coal in the City of Chicago. This is in conformity with the previous contentions of the appellee and with its methods

of administering the ordinance for many years, and the contrary suggestion is merely a tardy admission that the requirement that the load be rehandled is "drastic" and unreasonable.

The further suggestion now made by the appellee that there is nothing to prevent a downstate coal company from establishing an agent in Chicago as a public weighmaster does not ameliorate the unnecessary burden imposed by the ordinance on the appellant. So long as it is necessary in order to comply with the ordinance to unload and reload the coal in the City of Chicago, the establishment of an agent qualified to act as a weighmaster *inside the city limits* does not cure the vice of the ordinance as applied to those in the business of shipping coal by truck directly from mine to consumer, for if they have to unload their trucks to comply with the ordinance it makes little difference to them whether their agent or some other person does the slight physical acts of balancing the beam and reading and certifying the weights.

The appellee's statements that the ordinance can be complied with by any legitimate dealer or trucker and that the cost of a public weighmaster's certificate is but 25 cents fall into the same category. It is not the amount of the weighmaster's fee which is objectionable, but the whole unnecessary and burdensome procedure which must accompany the weighing by the public weighmaster in order to obtain a certificate at all.

The suggestion of the dissenting justices that a weighing of the empty truck might just as well take place after delivery as before is ridiculed by the appellee in Point III of its opposing jurisdictional statement. And yet an ordinance of the City of Chicago dealing specifically with

coal provides (Section 3342, Revised Chicago Code of 1931, Abstract in Supreme Court of Illinois, pp. 44-45):

> "Every such person, firm or corporation shall, on demand of the inspector of weights and measures of the city of Chicago, or any of his deputies, or the purchaser or intending purchaser or his agent or representative, or the person to whom the delivery is to be made, produce and deliver said [delivery] ticket or tickets to said officer or to his deputies, or to the purchaser or intending purchaser, or his agent or representative, or to the person to whom delivery is to be made, and whenever said officer or any of his deputies, or the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, shall demand that the said weights shown by said ticket or tickets be verified, it shall thereupon become the duty of the person, firm or corporation delivering such fuel to convey the same forthwith to some public scale selected by the inspector of weights and measures of the City of Chicago, or any of his deputies, or the purchaser or intending purchaser of the fuel being delivered, or his agent or representative, or the person to whom delivery is to be made, in the particular locality where the solid fuel is to be delivered, or to any private scale in the particular locality where the owner thereof shall consent to such use, and permit the weighing of the solid fuel, together with conveyance and equipment, for the purpose of ascertaining the gross weight thereof, and shall, after the delivery of such fuel, return forthwith with the conveyance and equipment used in the delivery of such solid fuel to the same scale and permit the weighing of said conveyance and equipment for the purpose of verifying the net weight of the solid fuel, as shown by the said ticket or tickets; * * *."

This ordinance, as amended May 18, 1934, deals specifically with coal, the subject matter involved in this controversy. It is clear from this section that when the city council of the City of Chicago dealt specifically with coal as distinguished from other commodities it recognized as a fact that weighing the vehicle after delivering the coal to the consumer is the only *reasonable* method of obtaining the tare weight of a loaded vehicle in rechecking a previous weighing. It is also clear from this section of the ordinance that the suggestion of the minority justices is not subject to ridicule but manifests a clear understanding of the problems involved in checking a weight already once legally determined.

Any objection that certification of the tare weight after delivery of the coal would not sufficiently protect the customer can easily be obviated by a provision in the ordinance that the customer *shall not be required to pay for the coal* until a weighmaster's certificate is presented showing gross, tare and net weights duly certified. The trucker could have the gross weight certified, dump the coal at the customer's location, and then return to the same weighmaster for certification of the tare and net weights. Only after presentation of such completed certificate would the customer be obliged to pay for the coal. The above procedure would be simple in operation and would afford to the customer the identical protection which he now receives by the requirement that the tare weight must be ascertained *before delivery* by the onerous method of dumping and reloading the coal. The procedure suggested would enable the appellant and others similarly situated to comply with regulations which would adequately protect the public but which would not arbitrarily and unnecessarily deprive them of their business.

We stated in our jurisdictional statement that sustaining the validity of this ordinance meant the destruction of a useful and necessary and legitimate business. While appellee's counsel characterize this statement as absurd the dissenting justices did not so consider it, because they stated that the ordinance

> "shows on its face that it is cleverly designed for the purpose of conferring a monopoly in the coal business upon dealers residing within the city of Chicago, to the exclusion of other citizens residing outside of that city who have an entirely lawful right to sell to persons who live within the corporate limits."

They further said of this ordinance:

> "It is likewise an unjust discrimination against large communities that happen to be so situated as to enable them to take coal from the ground cheaply and thus give a livelihood to thousands working in that business."

The duly elected State's Attorney of Grundy County and other officials in the coal district in the Illinois River Valley filed an intervening petition as *amici curiae* in the Supreme Court after the decision of the cause and set forth in their affidavit that:

> "The effect of this decision will be to close the mines located in the Illinois River Valley, many of which are not adjacent to any rail, switch or spur connections, and that depriving these mines of the right to truck coal will deprive them of their market for their produce. And that approximately Two Thousand (2,000) families in Grundy County alone are dependent upon the mines affected by this decision for their livelihood."

The majority opinion of the Illinois Supreme Court holds that if truckers have to establish coal yards in the City of Chicago to comply with this ordinance this is "incidental." In other words, the court has said in effect that the City of Chicago may by indirect means provide that no one can sell coal in Chicago unless he establishes a coal yard within the territorial limits of such city.

An ordinance which directly requires a coal yard to be established as a condition precedent to doing a coal business has been held unconstitutional in the case of *May Coal & Grain Co.* v. *Kansas City, Mo.*, 10 Fed. Supp. 792. In that case the city was enjoined from enforcing an ordinance which required all retail coal dealers in Kansas City to "possess and own proper equipment for the operation of such retail business within the limits of the city; such equipment shall consist of a coal yard or station with reasonable facilities therefor, an office and wagon scale of at least five tons capacity."

The Court said:

> "The enforcement of the ordinance against the plaintiff has destroyed that business or will do so unless the city is enjoined from such enforcement. This would result in depriving it of 'property without due process of law' within the first section of the 14th Amendment to the National Constitution.
>
> "The city would have no right to do this unless it was essential to protect the residents of the city against imposition. * * *
>
> "To the extent that the ordinance required an established place within the city, it was unreasonable and thus deprived plaintiff of its property without due process of law."

Appellee's counsel further say under Point III.

> "To a greater degree the user needs protection when coal is delivered to him by irresponsible, itinerant, part-time truckers using a miscellaneous lot of vehicles instead of regular coal trucks, from a mine 62 miles from Chicago."

However, if the "itinerant, irresponsible, part-time" trucker buys his coal from a Chicago coal yard he is supplied with a weighmaster's certificate and the ordinance in no way regulates him or his business. It is only when the mine owner or dealer or the trucker attempts to save rehandling charges in the City of Chicago that the City becomes concerned about whether or not he is "itinerant, irresponsible, or part-time." On its face this ordinance does not concern itself with the question of who should be in the coal business. It is not ostensibly designed for any other purpose than checking weights and measures.

We contend that this result can be obtained by a reasonable ordinance, but that the regulation *must be reasonable*, and no case is cited by the appellee which in any way denies that proposition. The Supreme Court of Illinois in the decision complained of has decided the matter by saying in effect *that the trucker cannot engage in his present business at all*—he must establish a coal yard where he can dump and reload his coal. He must go into an entirely different business, that is, the operation of a coal yard. This solution neither meets nor answers the question presented. It is because the Supreme Court of Illinois has said that the only way this appellant can comply with this ordinance *is to go out of business* that we here present a substantial Federal constitutional question for review. Any ordinance which deals with the problem in

such drastic and ruthless fashion can, we submit, have no presumptions indulged in its favor.

The weakness of the appellee's position is further disclosed when its counsel says that the reason this ordinance is necessary is because:

> "Furthermore, on the long haul to Chicago, perhaps a night haul, a portion of the load may be lost, some of it may be bartered for gasoline en route, and there is no assurance that the customer would receive the quantity weighed at the mine."

There are 3631 miles of streets and 912 miles of paved alleys within the City of Chicago. It is obvious, therefore, that a dishonest driver can obtain inside the City of Chicago a weight certificate required by this ordinance and then before delivery drive up any of these streets and alleys and do all or any of the things to cheat his customer that are suggested by appellee's counsel. *This ordinance has no effect whatever in preventing dishonesty after the original weighing.* The only ordinance which deals with that question is one imposing penalties for short weight (Section 2953, Revised Chicago Code of 1931, Abstract of Record, Illinois Supreme Court, pp. 41-42) concerning which this appellant has no complaint.

If, as appellee contends, the distance from mine to consumer justifies a rechecking of weights within the city limits of Chicago, still that does not justify the appellee in imposing a requirement *that can only be satisfied by unloading all coal within the limits of the City of Chicago,* when other equally effective methods are available which do not impose any such burden. We submit that the suggested method of verifying the mine weights without unloading and reloading the coal before delivery, together

with the provisions of valid, existing ordinances punishing the delivery of short weights, would be more than adequate to protect the purchaser against short weight and would afford him ample opportunity to determine before he takes delivery and pays his money whether or not he is in any manner imposed upon. If upon weighing the loaded vehicle, the gross weight, that is, the weight of the coal plus the vehicle, coincides with the gross weight as shown by the mine delivery ticket obtained by the previous weighing over state-inspected scales, it would be highly improbable that the net weight of the coal would have varied on the trip between the mine and Chicago more than the 1% allowed by the Chicago ordinance.

The real motive for excluding the appellant from the Chicago market is disclosed in the appellee's statement that, "if the ordinance were not enforceable, then the retail coal industry of Chicago would be demoralized by unfair and unethical competition."

Since the only time the City becomes concerned about this competition is when it results in a saving of a handling charge *of a dollar a ton to the consumers of the coal*, it must be patently clear that the City of Chicago is really trying to protect its local coal dealers from lawful, legitimate competition resulting from a more efficient method of doing business and that it is trying to accomplish this under the guise of protecting the public from short weight. When the City expresses concern for the retail coal industry within the City of Chicago it thereby discloses that this whole matter has a competitive origin and that the consuming public is to be penalized by being required to pay unnecessary handling charges exacted in the name of the police power.

If this ordinance were an honest, straight-forward enactment for the purpose of protecting the consumer, then we submit that it would require merely a reasonable method of checking *the legal weights certified at the mine*. The City of Chicago, if it were honestly enforcing the ordinance, would be just as concerned that the inherent saving involved in transporting coal direct from mine to consumer be passed on to the consuming public as are the dealers, miners and truckers engaged in the business. Protection of the public against short weights is to protect the public against paying excessive prices for what it buys. Prohibiting the economies which obtain in trucking coal directly from mine to consumer is manifestly contrary to the public welfare. Every argument of appellee in favor of protecting the public's purse against short weights is an argument against the unnecessary and expensive unloading and reloading of coal which the City of Chicago now requires under the guise of protecting the public's purse.

As the minority opinion stated:

> "It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unreasonable expense on the purchaser is clearly unreasonable."

The cases cited by the City of Chicago in support of its contentions under this heading are clearly distinguishable, as we have already pointed out. Much closer in point is *Louisville and Nashville R. Co.* v. *Melton*, 218 U. S. 36. There a motion was made to dismiss a writ of error sued out by the defendant railroad company which had unsuccessfully contended in the state court that a state statute

violated the 14th Amendment. Two judges of the court below (as here) had dissented.

This Court by Mr. Justice White said, (p. 49):

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous."

The further reasoning of the Court in that case is applicable to the present case, (a) because the present case requires analysis to determine whether prior decisions are decisive of the issue here presented, (b) because the division of opinion of the court below "suggests that the controversy here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below," and (c) because the majority of the court below considered the matter to be one of first impression and appellee's counsel have been unable to name a single case of this Court, or of any court other than the court below, holding a requirement of the kind here complained of to be valid and constitutional.

While the power to enact a reasonable ordinance which regulates methods of weighing coal or other commodities sold in load lots is within the police power of the state, this power is subject to the definite limitation that the State cannot under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them:

*Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513;
*Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400;
*Pierce* v. *Society of Sisters*, 268 U. S. 510, 534, 535;
*Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 412, 415;
*Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 9, 11.

In *Adams* v. *Tanner*, 244 U. S. 590, this Court said, (pp. 594-595):

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. * * * Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Certainly this appellant has a right to a determination of whether or not *it is necessary to bar him from business*

in order to protect the public. Certainly, the public has a right to a determination of whether it must pay $1.00 a ton more for its coal in order to gain protection from short weighing, when, as pointed out, the ordinance neither prevents it nor aids in the enforcement of other valid provisions of the ordinance which do prevent it. Certainly the truckers and miners have a right to know whether they can be constitutionally forbidden a weighmaster's license because they are non-residents or merely at the whim of the Mayor of the City of Chicago.

We submit this appellant has advanced a substantial constitutional question for the determination of this Court.

## IV.

### The Federal question asserted by appellant is not foreclosed by previous decisions of this Court.

The Court below held that the question here presented was one of first impression. Appellee contends, nevertheless, that the question is foreclosed by previous decisions of this Court, yet it points to no decision of this Court sustaining an ordinance which imposes the requirement imposed by this ordinance. It argues from analogy and from general rules, but even if such argument were successful, it would not satisfy the appellee's burden of proving that the question here presented has been decided, or is so plainly without merit as not even to be arguable.

In every instance the validity of an ordinance depends upon whether the ordinance is in fact and in law a reasonable and necessary exercise of the police power. On different statutes and different facts this Court has decided differently. In none of the cases cited by the appellee are the

very definite limitations on the exercise of the police power denied.

The cases cited by counsel for the appellee to sustain their contentions under this heading are clearly distinguishable on their facts. Thus:

In the case of *Schmidinger* v. *City of Chicago*, 226 U. S. 578, said to control the decisions of the instant case, the holding was only that the fixing of the weight of a loaf of bread was not an unnecessary or arbitrary exercise of the police power. This Court, however, did not refuse to pass upon that question.

The case of *Merchants Exchange* v. *Missouri*, 248 U. S. 365, is distinguishable on its facts. Under the state statute there involved, public weighmasters were appointed by the state and the warehousemen themselves were forbidden to issue certificates of weights in cities where such weighmasters were appointed. In the instant case, the local coal dealers operating coal yards in the City of Chicago are appointed weighmasters and do the weighing themselves. The non-resident trucker or mine operator must take his coal into his competitor's yard, dump it and then reweigh it. Assuming that this can be done without objection or hindrance from the local coal dealer the rehandling charge of $1.00 a ton effectively imposes an embargo on down-state coal, to avoid which the trucker or mine operator must go into a totally different business, namely; operating a coal yard of his own in the City of Chicago.

In the *Merchants Exchange case, supra,* this Court, prior to holding the ordinance valid held it was not an unreasonable or arbitrary exercise of the discretion vested in the legislature. By this finding the Court recognized the limitation on the power of the state or city to enact such

legislation, which we have asserted here, namely, that such legislation must be reasonable and necessary. This question, we submit, cannot be determined in the instant case without a hearing on the merits.

In Point IV of its opposing statement, appellee repeats its assertion that "the ordinance does not call for any unloading or rehandling of coal." The Supreme Court of Illinois holds that it does and the appellee has always so contended. The case is presented here on that construction of the ordinance. The present insistence of the appellee that the ordinance does not require an unloading en route from mine to consumer is, we submit, an admission that such a requirement is invalid.

In our original jurisdictional statement we pointed out the discrimination between dealers owning scales and loading their coal within the City of Chicago and those owning scales and loading their coal outside of the City. Both are held by the court below to be subject to the same requirement of obtaining a public weighmaster's certificate, yet only the first group is permitted to become public weighmasters.

The appellee answers that it would be absurd to permit a mine owner located 62 miles beyond the city's limits to obtain a public weighmaster's license. Yet, in cases of milk inspection, city inspectors must and do go beyond city boundaries to inspect the dairies of those who seek to sell milk within the city, and certainly it would be unconstitutional to prevent the sale of milk without inspection and then to refuse to make an inspection.

An important thing to be considered here, in determining whether the ordinance is reasonable as to a person bringing coal in from outside the City of Chicago by truck, is that the means of satisfying the requirements of the ordi-

nance which are given the local dealer by permitting him to become a public weighmaster are not available to the non-resident miner or trucker at the place where such means would enable them similarly to satisfy the requirements of the ordinance, *i. e.*, at the point at which transportation to the consumer originates.

The issue here is not and never has been one between the present ordinance on one hand and the absence of all regulation of appellant and those similarly situated on the other hand, but the issue is between the unreasonable regulation imposed on appellant by this ordinance and some reasonable ordinance which the appellee has ample power to enact. In the *Wisconsin Lime and Cement Co.* v. *City of Chicago* case, 312 Ill. 520, the inherent differences between different methods of selling coal were recognized, the Illinois Supreme Court saying, (p. 524):

> "A wholesale dealer selling in car-load lots is not in the same class as the dealers included in the ordinance."

By the same token, it must be apparent that a dealer selling coal from a mine direct to a consumer is not in the same class as a dealer selling from a local coal yard. In the first case, the only legitimate public interest is a check in some reasonable manner upon the mine weights. As is stated by the minority opinion below, requiring a rehandling of the coal is not necessary to obtain this result. *Since unnecessary, the requirement here complained of must, as a logical necessity, be held unreasonable.*

We have pointed out that questions of large public interest are involved in this appeal and that a substantial question is presented. We submit that the motion of the

appellee to dismiss or affirm should be denied and that upon the hearing on the merits the decision of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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